No. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

NUMBER [illegible] MISC.

RAY EDWARD GONZALES AND DONALD [illegible], *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Fifth Circuit

[illegible]
Attorneys for Petitioners

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Fifth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Ray Edward Gondron and Daniel Elchuk, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered June 5, 1958, and affirming their convictions in the District Court for the Southern District of Texas, Laredo Division, upon an indictment charging them with a violation of the marihuana transfer tax laws of the United States (Sec. 4744(a), Title 26, USC).

Opinions Below

Petitioners were twice convicted on the same indictment and have twice appealed. A copy of the opinion delivered by the court of appeals upon the rendering of its judgment affirming petitioners' second convictions and by this petition sought to be reviewed (R. 200) is hereto attached as Appendix "A" *infra*, p. 21. The opinion has not yet been reported. A copy of the judgment of affirmance (R. 207) is attached as Appendix "B", *infra*, p. 27.

In order to ascertain the grounds of the judgment herein sought to be reviewed and to resolve the question here presented, it is necessary to make reference to the opinion of the court of appeals delivered upon the rendering of its judgment disposing of petitioners' first appeal and of an original motion filed by the government in the court of appeals praying that petitioners' case be remanded to the district court for a new trial on the ground that their convictions had probably been obtained upon the false testimony of one of the government's key witnesses. The motion filed pending petitioners' first appeal, was submitted with it. That opinion is reported in *Gondron and Elchuk v. United States*, 242 F. 2d 149, and a copy of it is hereto attached as Appendix "C", *infra*, p. 28.

The opinion last referred to (Appendix "C") will be found at page 258 of the record filed in the court of appeals on petitioner's first appeal under the number 16,334, which record petitioners have caused to be certified and filed in the office of the clerk of the Suprme Court, and which they by reference make a part of this petition, praying the court to take note of it.

Because the court of appeals in its opinion written in rendering the judgment herein sought to be reviewed approved and in effect adopted the opinion of the district judge delivered upon his denial of petitioners' application for the allowance of bail pending their second appeal (R. 191), reported in *United States v. Gondron and Elchuk*, 159 F. Supp. 691, a copy of that opinion is attached hereto as Appendix "D", *infra*, p. 30, and for the same reason a copy of the opinion of the district judge in the related case of *Elchuk v. McCarty, U. S. Marshal*, 159 F. Supp. 689, in which the district judge denied petitioner Elchuk's application for the writ of habeas corpus, is attached hereto as Appendix "E" *infra*, p. 34. Petitioner Elchuk appealed from the judgment of the district court, and as a matter incident to the district Court's opinion (Appendix "E"), the order of the court of appeals remanding the habeas corpus case to the district court with direction to vacate its judgment and to dismiss the proceeding without prejudice is attached hereto as Appendix "F", *infra*, p. 38, et seq.

The opinion last referred to (Appendix "E") will be found at page 18 of the record filed in the court of appeals under the number 16,990, on petitioner Elchuk's appeal from the order of the district court denying his application for the writ of habeas corpus, which record petitioners have caused to be certified and filed in the office of the clerk of the Supreme Court and which by reference they make a part of this petition, praying the court to take note of it. The order of the court of appeals remanding the habeas corpus case to the district court, as aforesaid, will be found at page 36 of the last mentioned record.

Jurisdictional Statement

The date of the judgment sought to be reviewed (R. 207) was June 5, 1958, and it was entered the same day (R. 207). Petition for rehearing (R. 208), filed in the court of appeals on June 23, 1958, was denied July 30, 1958 (R. 218).

The statutory provision believed to confer jurisdiction on the Supreme Court to review the judgment in question by writ of certiorari is Section 1254(1) of the *Judicial Code*, Title 28, U.S.C.A.

Question Presented

Under the circumstances of the case now to be stated, should the petitioners' plea of double jeopardy have been sustained?

Where petitioners, who were convicted in the district court after trial to a jury regularly obtained and empaneled upon a valid and sufficient indictment, appealed to the court of appeals, and where pending their appeal the government filed in the court of appeals its original motion to set aside the verdict and judgment of conviction and to remand the case for new trial on the ground that the convictions had probably been obtained by the false testimony of a government key witness, in which motion petitioners neither joined nor acquiesced, and where the court of appeals, without passing upon petitioners' appeal or the errors assigned by them, set aside the convictions on the government's motion and remanded the case for a new trial, *should petitioners' plea of double jeopardy interposed with timeliness on their second trial have been sustained?*

Constitutional Provisions and Statutes Involved

The provision of the *Fifth Amendment to the Constitution of the United States* relating to double jeopardy, here involved, is as follows:

> " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * "

The Act of June 25, 1948, c. 646, 62 Stat., 963, Section 2106 of the *Judicial Code*, Title 28, U.S.C.A., here involved, is as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Act of Aug. 16, 1954, c. 736, 68A Stat. 562, Section 4744(a) Internal Revenue Code 1954, Title 26 U.S.C.A., defining the offense of which the petitioners were convicted in the district court, is as follows:

> (a) It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to

be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741(a).

Statement of the Case

(The record on petitioners' first appeal, court of appeals number 16,334, heretofore mentioned, will be referred to herein as "Record on First Appeal", followed by the appropriate page number.)

The indictment on which petitioners have been twice convicted, as aforesaid, (R. 5, and Record on First Appeal, 8) is in three counts; the first two charge violations of the customs laws of the United States (Sec. 545, Title 18, U.S.C.A.) and third a violation of the marihuana transfer tax laws (Sec. 4744(a), Title 26, U.S.C.A.)

Petitioners on their first trial were convicted on all three counts of the indictment (Record on First Appeal, 214), but on their second trial the district judge on the petitioners' motion entered judgments of acquittal on the first two counts (R. 139), with the result that they were convicted on the third count only (R. 175, 176). Gondron was sentenced to 5 years (R. 178), and Elchuk to 8-1/2 (R. 179). Petitioners' motion for new trial having been denied (R. 182) they appealed (R. 183-186). Their convictions were affirmed (R. 200, 207—Appendix "A" and "B".)

On their second trial petitioners, before they had pleaded to the merits, interposed their plea of double jeopardy in the form of a motion to dismiss the indictment (R. 7, 8), in accordance with Rule 12 of the Federal Rules of Criminal Procedure. Their plea was denied (R. 10) and, as already stated, they were put to trial a second time.

The facts upon which petitioners rested their contention that they had been once in jeopardy are here summarized with references to the record:

Petitioners appealed from their first conviction to the court of appeals (Record on First Appeal, 229, 244), and pending their appeal the United States Attorney for the Southern District of Texas on behalf of the government filed in the court of appeals his original motion praying that petitioners' case be remanded to the district court for new trial on the ground that their convictions had probably been obtained by the false testimony of one of the government's key witnesses (R. 8-A, and Record on First Appeal, 255). The petitioners did not join or acquiesce in the government's motion.

The government's motion was submitted and argued before the court of appeals at the time of oral argument on the appeal. The court of appeals after the hearing on the motion remanded petitioners' case for new trial (Record on First Appeal, 258, 260), and, as petitioners will contend, did so on the government's motion and not on their appeal.

A copy of the mandate remanding petitioners' case for new trial will be found in a footnote to the court's opinion (Appendix "A", footnote 2, page 21).

For the convenience of the court, a copy of the government's motion is hereto attached as Appendix "G".

The Reasons Relied On For The Allowance Of The Writ

Petitioners contend that in this case the court of appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court,

and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervision.

The argument under this heading will be presented under two points as follows:

Point I: **Petitioners' first convictions were set aside on the government's motion and not reversed on their appeal.**

Point II: **Where a valid verdict rendered by a jury regularly obtained and empaneled upon a valid and sufficient indictment, is set aside upon the application of the prosecuting attorney an accused will be protected from a second prosecution for the same offense, unless he acquiesces in such application.**

First Point: **Petitioners make their contention that their first convictions were set aside on the government's motion and not reversed on their appeal, notwithstanding the use of the word "reverse" in the mandate remanding their cause for new trial and in the opinion pursuant to which the mandate issued. When the mandate is construed in connection with the opinion, the conclusion that petitioners' cause was "set aside" under authority of the statute (Sec. 2106 of the Judicial Code, set forth in full, supra, p. 5), and not "reversed", is irresistible. The statute itself makes a marked distinction between setting aside a judgment, on the one hand, and reversing one, on the other.**

For a proper construction of the mandate reference to the language used by the court of appeals in its opinion must be made. In its opinion the court said: *"We need not pass on their* (appellants) *contentions* for the government by its motion here agrees that a new trial should be granted and that the judgments ought not to stand because the convictions may have been tainted by the untrue and false testimony of a specified key witness." Since the contentions of petitioners, as appellants below, were all directed to errors assigned by them, the statement of the court below with respect thereto can mean nothing more nor less than that the court did not pass upon the errors so assigned, and since an appellate court can reverse a judgment for error only,[1] appellants contend that their cause on appeal was not reversed; the court could not have reversed a cause for errors upon which it did not pass.

Again, the court of appeals said: " . . . exercising the discretionary duty imposed upon us, 28 U.S.C.A. 2106, *we would not have* here rendered judgments of acquittal, even though the evidence might have been sufficient." The words "we would not have" can only mean that the errors were not of such nature that the court would have rendered judgments of acquittal if it had reversed the cause for errors; otherwise, the court would have spoken in the present tense and would have said in substance: "We do not" or "We cannot exercise our discretion to render judgments of acquittal".

Petitioners submit that the court of appeals, if it had intended to reverse petitioners' cause for error, would not

[1] **Lasser et al. v. Stuyvesant Ins. Co.**, Supreme Court, Chautauqua County, New York, 16 N.Y. Sup. 2d 401; 258 App. Div. 340.

have cited the statute (28 USCA 2106); they take the view that the court cited the statute as a showing of its authority and power to set the judgments of conviction aside on the government's motion, as contradistinguished from a reversal for error. Neither would the court have cited the case of *Mesarosh v. United States*, 352 U.S. 1, 1 L. Ed. 2d 1, 77 S. Ct. 1, or *Communist Party of USA v. Subversive Activities Control Board*, 351 U.S. 115, 100 L. Ed. 1003, 76 S. Ct. 663, if it had intended to reverse the judgment for error, because it would have been unnecessary; those cases were cited, petitioners contend, only to show again the authority and power of the court to set aside the judgment on the government's motion, because that is what was done in those cases. Those cases had no bearing whatsoever on the errors assigned by petitioners on their first appeal.

For the reasons already given, the court, when it said that "the reversals requested and *obtained* by appellants, must be for a new trial," could not have meant that appellants "obtained" the reversals on their appeal. It only meant, petitioners think, that they got what they asked even though they got it by reason of the granting of the government's motion; an unexpected windfall.

Petitioners contend that nobody knows to this day that the court, if it had passed upon the errors assigned on their appeal, would not have affirmed the judgments of conviction. Indeed, the government filed a lengthy brief in which its counsel strenuously urged, as he did on oral argument, that the case should be affirmed, and petitioners are not so bigoted as to say that he might not have been right.

Petitioners submit that the courts below were wrong in treating the government's motion as a confession of error and in holding that the action taken by the court of appeals on their first appeal was tantamount to a reversal pro confesso (Appendices "A", "D" and "E"). The action of government's counsel in filing his motion, if it is to be considered as a confession of error, was entirely inconsistent with his whole attitude and his performances in managing the government's case on petitioners' first appeal; after the filing of the motion, he filed his brief in which he urged with sharp insistence that there was no error below and on oral argument presented his contention with equal vigor. If he confessed error by the filing of his motion, he afterwards retracted his confession by the filing of his brief and by his argument.

A cursory reading of the motion is sufficient to negative the idea of a confession of error; it is not in the form of one, for a confession of error is a plea to an assignment of error by which the assignment is admitted, whereas the motion was on grounds altogether foreign to the subject of error. It asked that petitioners' case be remanded to the district court for the reason that it would not be in consonance with the dignity of the United States government to permit a conviction which had probably been obtained upon the false testimony of a government witness to stand, and that is not error.

Petitioners' case is easily distinguishable from the case of *Stroud v. United States*, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103, cited by the district judge in his opinion delivered in denying the writ of habeas corpus applied for by petitioner Elchuk (Appendix "E") and approved by the court of appeals (Appendix "A"). In that case the confessions

of error by the solicitor general upon previous appeals by Stroud were, presumably, in due form, and moreover on those appeals the convictions and sentences upon former trials were reversed upon writs of error sued out by the plaintiff in error. (See opinion in Stroud case as reported in 64 L. Ed., col. 1, p. 110, second paragraph).

*Second Point*s In support of their second point appellants rely upon the following authorities:

State vs. Oglesby, 164 La. 329, 113 So. 865;
People ex rel. Ostwald vs. Craver, 70 NYS 2d 513, 272 Appellate Division (N.Y.) 181; Id., 65 NYS 2d 748, Supreme Court Rensalaer County, N.Y. 1946, in both of which cases a judgment of conviction was set aside upon the motion of the prosecuting attorney.

State vs. Adams (S.D. 1879) 78 NW 353, in which the court of its own motion arrested the judgment of conviction.

Fletcher vs. United States, (1844), 1 Haywood and Hazelton 186, Fed. Cas. No. 4868, and 1 Haywood and Hazleton 200, Fed. Cas. No. 4869; and State vs. Smith (1879) 68 Me. 328, in all of which cases a nolle prosequi was entered.

And see 22 CJS—Criminal Law—Sec. 271, n. 56, p. 406.

Appellants' contention under the second point is well stated in the italicized portion of the following from Corpus Juris Secundum, *supra:*

"It is an established principle of law that an accused in a criminal case who procures a verdict and judgment against him to be set aside or arrested by the court

may be tried anew upon the same or another indictment for the same offense of which he was convicted, even after he has served a part of the sentence imposed on him in the first conviction. *However, it is only where accused has brought about the destruction of the first verdict that he can be tried again for the same offense; and he will be protected from a subsequent prosecution for the same offense where a valid verdict, rendered by a jury regularly obtained and empaneled, upon a sufficient indictment, is set aside by the court on its own motion or on application of the prosecuting attorney, unless accused acquiesces therein.*"

The destruction of the verdict was not brought about by the petitioners despite their strenuous efforts to do so, for their efforts to destroy the verdict were all unsuccessful. They filed a motion for new trial after their conviction and it was denied; they appealed and the court of appeals declined to pass upon the errors assigned by them, stating that it was unnecessary to do so in view of the government's motion.

In *People ex rel., Ostwald v. Craver, supra*, the accused was convicted of culpable negligence. After he began the service of his sentence the district attorney learned that one member of the jury which sat in the trial of accused was not a citizen of the United States, whereupon he moved to have the verdict set aside on the ground that the jury was illegally constituted. The motion was granted and Ostwald remanded to custody for a new trial. He took no part in the motion to set aside the verdict of conviction.

The appellate court questioned the correctness of the order setting aside the verdict, but, said the court, the

verdict having been set aside on the application of the district attorney, defendant could not be tried again for the same offense. In the lower court in the *Ostwald* case the court had this to say:

> "If Ostwald had obtained a new trial after conviction upon his own application, he thereby would have voluntarily placed himself again in jeopardy and would not have been able to invoke the constitution for immunity. In a criminal case it is only where the accused has brought about the destruction of the first verdict that he can again be put upon trial for the same offense, citing People vs. McGrath, 202 NY 445, 96 NE 92.
>
> Such is not the case here. The motion to set aside the verdict of the jury and for a new trial was made by the people. The paradox here presented has merit in the law."

In the case of *State v. Oglesby, supra*, Oglesby was convicted of violating the Louisiana liquor statute, and charged with being a second offender, in that he had been convicted previously of manufacturing intoxicating liquor for beverage purposes. The district attorney and a deputy sheriff by their testimony identified the defendant as being the J. P. Oglesby who was previously convicted. On their testimony and against defendant's denial, the court found him guilty of committing a second violation of the statute and gave him the maximum penalty. Thereafter the district attorney found that he and the deputy sheriff had been mistaken in their identification of the defendant as the J. P. Oglesby who had been previously convicted and on motion of the district attorney the trial judge immediately set aside the conviction and or-

dered a new trial. When the case was called for trial again, the defendant filed a plea of jeopardy. Nevertheless he was tried again as a first offender and convicted. The Louisiana appellate court had this to say:

> "Whether done rightfully or wrongfully, the first verdict was set aside, and, being set aside at the instance of the district attorney and with his approval and acquiescence, it cannot now sustain a sentence of fine or imprisonment. The second verdict and sentence, from which this appeal was taken, are null because the new trial was ordered not at the instance of the defendant but on the application of the district attorney. The verdict and sentence are annulled and it is ordered that the defendant be discharged."

In *State v. Adams*, supra, Adams was convicted of rape alleged to have occurred on August 30, 1896, upon a female under the age of 16 years. It developed that on that day the victim of the rape was over the age of 16. The court having first denied defendant's motion for new trial, of his own motion arrested the jugdment. Defendant was tried again and convicted on an information charging the rape to have occurred on December 20, 1895, at which time the female was under 16 years. The court spoke as follows:

> "Had judgment been arrested at the instance of the accused, or for defects appearing upon the face of the information, a question not here presented would require attention; but upon the record before us we deem argument and the citation of authority unnecessary to show an instance of former jeopardy in every constitutional sense, clearly within the universally acknowledged rule."

The decision of the Circuit Court of the District of Columbia in the cases of *Fletcher v. United States*, supra, has stood unreversed, unmodified and unchallenged since 1844 when the cases were decided. The case is old but the *Fifth Amendment* is older.

In the *Fletcher* cases a nolle prosequi was entered and a new indictment presented because the first indictment was insufficient in form under the statute. The accused pleaded autrefois convict. The circuit court held the prior conviction and nolle prosequi to be a good and sufficient bar to the second prosecution, holding the first indictment to be good at common law even though insufficient under the statute, and remanded the cause with directions to discharge the prisoner.

In the case of *State v. Smith*, supra, the following is from the headnotes:

> "The attorney general has the power to enter a nolle prosequi, to the whole, or any part of an indictment, without the consent of the prisoner, either before or after a jury is empaneled or after verdict. If after verdict, and the indictment is sufficient, it will be a bar to any new indictment for the same offense."

The cases of *Mesarosh v. United States*, 352 U.S. 1, 1 L. Ed. 2d 1, 77 S. Ct. 1, and *Communist Party of USA v. Subversive Activities Control Board*, 351 U.S. 115, 100 L. Ed. 1003, 76 S. Ct. 663, cited by the court of appeals in its opinion disposing of petitioners' first appeal (Appendix "C"), neither had any bearing on the errors assigned on the first appeal nor are they authority on the question of jeopardy here involved, for in the Mesarosh case the accused acquiesced in the solicitor general's mo-

tion to set aside his conviction by filing a counter-motion asking that it be set aside, and in the Communist Party case the party itself filed the motion for leave to adduce additional evidence and for a remand of the case for that purpose.

Petitioners have found no case holding that the mere fact that one convicted of crime has appealed deprives him of the protection of the conviction as a bar to a subsequent prosecution; it is the action taken on the appeal by the appellate court that determines the question of such immunity. It has, of course, been held that a plea of autrefois acquit or autrefois convict may not be sustained where it is interposed pending an appeal, but in the case at bar petitioners' first appeal and all former proceedings upon which their plea was based had been concluded at the time of the filing and presentation of their plea; once the government's motion was granted, their appeal became moot and fell with the judgment upon which it was pillared.

If petitioners waived their immunity by the mere fact that they appealed, they did the same thing when they filed their motion for new trial. If the results sought by petitioners on their appeal were indirectly obtained by the granting of the government's motion, the same thing may be said as to the result sought on their motion for new trial. It has never been held in any case in which the circumstances have been like or similar to those in petitioners' case that the filing of a motion for new trial, unless it is granted, precludes one who has been convicted of crime from seeking protection under the constitutional provision relating to double jeopardy; see *State v. Adams*, *supra*, for example.

In no view of the case can it be said that the mere taking of their appeal from their first convictions amounted to an acquiescence by petitioners in the government's motion, for the appeal was taken before the filing of the motion and therefore before petitioners knew there would be such motion.

This very case furnishes a striking example of the reasons for and the wisdom of the ancient rule of double jeopardy. The section of the Internal Revenue Code defining the offense of which petitioners were convicted (Sec. 4744(a), Internal Revenue Code 1954, *supra*, p. 5), provides a means by which the government may obtain the benefit of a presumption of guilt; it provides that the failure of one who is found in possession of marihuana, after reasonable notice and demand by the Secretary of the Treasury or his delegate, to produce the purchase order form prescribed by the Secretary for the transfer of marihuana (Sec. 4742 Internal Revenue Code 1954), shall be presumptive evidence of guilt. It will be noted that demand upon the petitioners for the production of the order form was made for the first time on their second trial (R. 65-71, 123-125). On their first trial petitioners were asked to produce the form showing their import tax to have been paid (Record on First Appeal, 47, 48); but on that trial no demand was ever made for the production of the form showing payment of the marihuana transfer tax.

In other words, the government on the second trial was in position to produce evidence which it did not have on the first. If the government is permitted when it is faced by a pending reversal of a cause for insufficiency

of evidence, to go back to the trial court on its own motion to *make* evidence there would be no end to prosecution.

CONCLUSION

Because the question of federal law here presented, important alike to the courts, to the bar, and to all the people, has not been, but should be, settled by the Supreme Court, and because the Court of Appeals for the Fifth Circuit in rendering its judgment here sought to be reviewed has so far sanctioned a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Court's supervision, petitioners pray that this petition be granted and that thereupon this cause proceed in accordance with the Revised Rules of the Supreme Court and the statutes of the United States governing the proceedings following the granting of a petition for the writ of certiorari, to the end that the said judgment be reviewed and reversed by this court. And petitioners pray for such process, orders and writs, and for such other and further relief, as to this court may seem proper.

Respectfully submitted this _____ day of August, 1958.

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APPENDIX "A"

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 17134

RAY EDWARD GONDRON and DANIEL ELCHUK,
Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeals from the United States District Court for the Southern District of Texas

(June 5, 1958)

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: When these appellants were first here by their appeal in Cause No. 16334 on the docket of this court[1] seeking a reversal of judgments of conviction on three counts of an indictment charging violation of the customs and marihuana tax laws of the United States, this court on March 14, 1957, by its man-

[1] Gondron v. United States, 242 F.(2) 117.

date and judgment[2] reversed the judgments of the district court and remanded the cause to it for a new trial.

The cause returned to the district court, the defendant Elchuk alleging that the former judgments had not been reversed on appellant's appeal but had been set aside and vacated on the government's motion in the appellate court to set aside the convictions and remand the cause for new trial, and claiming former jeopardy, brought habeas corpus proceedings to secure his release.

The district judge, treating the application as a plea of former jeopardy in bar of further prosecution, rather than a habeas corpus proceeding, in an opinion[3] with which we find ourselves in full agreement, overruled and denied the plea.

---

[2] "WHEREAS, lately in the United States District Court for the Southern District of Texas, before you, in a cause between United States of America, plaintiff, and Ray Edward Gondron and Daniel Elchuk, defendants, No. 17271 Criminal, wherein the judgments of the District Court entered in said cause on the 28th day of September, A. D., 1956, was in favor of plaintiff, United States of America, and against defendants, Ray Edward Gondron and Daniel Elchuk, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of appeals sued out by Ray Edward Gondron and Daniel Elchuk, agreeably to the act of Congress in such case made and provided, fully and at large appears.

"AND WHEREAS, in the present term of October; in the year of our Lord one thousand nine hundred and fifty-six, the said cause came on to be heard before the said United States Court of Appeals on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for new trial."

[3] Elchuk v. McCarty, U. S. Marshal, 159 F. Supp. 689.

On Feb. 17, 1958, both defendants renewing by pleas in bar their claims of former jeopardy, sought a dismissal of the indictment and their discharge from further prosecution, and, these pleas denied, the cause was fully tried to a jury. The evidence concluded, defendant's motion for acquittal was sustained as to counts one and two, the customs counts charging unlawful importation and concealment after importation, and denied as to count three, charging acquisition of marihuana without paying the transfer tax. Submitted to the jury on a thorough and careful charge, to which defendants made no objection and both defendants convicted and sentenced on count three, they have appealed.

Their application for release on bail, on the ground that there were substantial questions to be determined upon appeal, was denied by the district judge for the reasons stated in his opinion in *U. S. v. Gondron*, 159 F. Supp. 691, and appellants applied to this court for bail. The cause advanced on the docket for early hearing and decision and the application for bail taken with the case, the defendants are here on brief and oral argument, asserting two grounds for the reversal of the judgment. The first is their plea of jeopardy based on the claim that their prior convictions were not reversed on their appeal but were set aside on the government's motion, and defendants are not, therefore, prevented by the fact of their appeal from urging the plea. The second is that the demand for the production of the order form required by Sec. 4742 of the 1954 Code was not a reasonable demand, and the evidence is therefore insufficient to support the verdict.

We think it quite plain that, as pointed out by the district judge in his two opinions in this cause, *supra*, neither of these positions is well taken, that indeed they are without substance.

The first, based on a wholly inadmissible attempt, without evidence to support it, and in the face of a record establishing the contrary, to present the judgment of reversal on their appeal as not such a reversal, is completely answered by our opinion and that of the district judge, *supra*, and by the record and our mandate and judgment in the case, note 2, *supra*. Finally, as the slightest reflection upon the nature and object of such a plea and a reading of the cases dealing with the effect upon the plea of the fact that the second trial, of which the defendant complains, has come about from the defendant's own act in seeking it, will show, this contention is answered by the controlling consideration that the plea, which when soundly laid is based and sustained upon the profoundest grounds of public policy, is not a mere catch penny contrivance, by the use of which one who has sought and obtained reversal and new trial to obtain and keep the benefit, without the burden, of the new trial.

When it comes to the second point, it is quite plain that appellants have misconceived the purpose and effect of the statutory provisions dealing with the order form and that the district judge was right in saying:

> "Customs Agents testified to making demand just prior to the trial on defendant Elchuk in the County Jail and on Gondron in his hotel room for production of the order form required by Sec. 4742 Title 26 U.S.C.A. and of failure to produce the order

> form. Defendants objected to this and as to the sufficiency of the evidence in this connection. I think it was proper and sufficient proof of failure to pay the tax. Neither defendant testified. The evidence was circumstantial and so strong as to exclude any hypothesis other than that of guilt. There were no exceptions to the court's charge." *Gondron v. U. S.*, 159 Fed. Supp. 161.

The demand for and refusal to furnish an order form when demanded is no part of the offense, *Vogt v. U. S.* 156 F(2) 308; *Cratty v. United States*, 163 F(2) 844. It is not necessary to a conviction therefore to allege or prove that a demand for an order form was made. Where, however, demand for and refusal to furnish is shown, this puts upon the defendant the burden of going forward. It is sufficient, therefore, to allege unlawful possession without an order form and to prove this fact by proving either a demand and a refusal without explanation to furnish the form, thus putting the burden of going forward on the defendant or by proving the fact of such unlawful possession in some other way. In short, the decisions settle it that while the demand for an order form and the refusal to furnish it do raise a prima facie presumption that the possession is unlawful, guilty possession can be proven without proof of such demand.

In this case the fact that the evidence was sufficient to prove guilty possession is attested by the fact that the defendants in their brief claim insufficiency of the evidence only because the demand for the order form was, as they claim, made at such a time as to be unreasonable, that in short they pitch their whole case on the assumption that the demand for the order form was an essential

ingredient of the proof, and, because it was unreasonable, the case for conviction fails.

In the first place, as pointed out in the brief of the United States, as far as the appellant Gondron is concerned, the demand for the production of the order form was made some four or five months before trial. As to both defendants, the record of the former trial, of which we take knowledge, shows: that a demand had been made upon each of them for an order form; that the demand made on this trial, to which Elchuk answered that he had never had such a form, did not, therefore, come as a surprise to him; and that, under the circumstances of this case, the demand was not unreasonable. This, taken with the fact that he gave no reason for his claim that the demand was unreasonable and did not ask for more time to comply, and that he made no objection to the charge, submitting the matter of the demand for the order form, makes it clear that the claim that it was unreasonable is without substance. In addition, we think the evidence is ample, without the demand and failure to furnish such form, to show guilty possession.

No error being made to appear, the judgment is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
By CLARA R. JAMES
Deputy

New Orleans, Louisiana

(SEAL)

APPENDIX "B"

JUDGMENT.

Extract from the Minutes of June 5, 1958.

RAY EDWARD GONDRON and DANIEL ELCHUK,

versus

UNITED STATES OF AMERICA

No. 17134.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C"

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 16334

RAY EDWARD GONDRON and DANIEL ELCHUK,
Appellants,

versus

UNITED STATES OF AMERIC., Appellee

Appeals from the United States District Court for the Southern District of Texas

---

(March 14, 1957.)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

PER CURIAM: Appellants seek reversal of their convictions for violations of 26 USCA 4744(a), 18 USCA 545 for importation, concealment and transportation, and transfer of marihuana. We need not pass on their contentions for the Government, by its motion here, agrees that a new trial should be granted and that the judgments ought not to stand because the convictions may have been

tainted by the untrue and false testimony of a specified key witness.

The result is that the relief sought by the appellants, the reversal of the judgments, is granted as prayed for by each of them. *Mesarosh v. United States*, 352 U.S. . . ., 1 L. Ed. 2d 1, and see *Communist Party of USA v. Subversive Activities Control Board*, 351 U.S. 115, 100 L. Ed. 1003.

But since the cases are such that, exercising the discretionary duty imposed on us, 28 USCA 2106, we would not have here rendered judgments of acquittal even though the evidence might have been insufficient, the reversals requested and obtained by appellants must be for a new trial. *Bryan v. United States*, 5 Cir., 175 F. 2d 223, affirmed 338 U.S. 552, 94 L. Ed. 335.

REVERSED AND REMANDED FOR NEW TRIAL.

APPENDIX "D"

UNITED STATES OF AMERICA

v.

RAY GONDRON and DANIEL ELCHUK

Cr. No. 17271

UNITED STATES DISTRICT COURT

S. D. TEXAS,

LAREDO DIVISION

March 10, 1958

(Reported 159 F. Supp. 691)

ALLRED, District Judge.

Defendants were convicted in this cause in September 1956 on three counts charging violation of 26 U.S.C.A. Sec. 4744(a) and 18 U.S.C.A. Sec. 545. That conviction was reversed upon appeal.[1]

Another trial was had on February 17, 1958, and defendants were convicted upon the third count, charging acquisition of 60 pounds of refined marihuana without payment of the transfer tax.[2] Gondron was sentenced to 5 years and Elchuk to 8-½ years.[3]

---

[1] Gondron v. United States, 5 Cir., 242 F. 2d 149.

[2] The court sustained motions for verdict of acquittal on counts one and two, charging unlawful importation and concealment after unlawful importation, 18 U.S.C.A. Sec. 545.

[3] Elchuk had been sentenced on the first trial to 10 years as a second offender and had elected to enter upon service of his sentence while it was on appeal. He had served approximately 18 months at the time of the present trial.

Both defendants gave notice of appeal from the present conviction and move for the allowance of bail. The motion is denied. In my opinion there is no substantial question to be determined upon appeal. The only question seriously pressed by defendants will be stated as discussed:

First

Defendants filed pleas of jeopardy because, after they had appealed the former conviction and sought reversal, the Government also filed a motion asking that the case be reversed. The Court of Appeals granted both motions and reversed for a new trial. The same claim of jeopardy was made in an application for habeas corpus by Elchuk in advance of this trial. The court treated such application as a plea of jeopardy and overruled it October 9, 1957, Elchuk v. McCarty, D.C., 159 F. Supp. 689. Notice was given of appeal from that order. There is no basis whatever, in my opinion, for the claim of jeopardy for all the reasons set out in the previous opinion.

Second

Defendants objected to introduction in evidence of the 60 pounds of marihuana and the chemist's analysis of samples therefrom on the ground that the chain of possession was broken and, therefore, there was not sufficient evidence to show that the marihuana introduced upon the trial was that which was seized by the officers. The evidence in this connection was as follows:

The seizure was made by customs agents Richards, Kinney and Diosdado. Kinney testified that he sealed the 60 small plastic bags with adhesive tape and placed his initials thereon; that these plastic bags were placed in three large

sacks in which they had been found when seized; that these larger sacks were initialed by him; and then taken in charge by Diosdado. Kinney positively identified the 60 bags as being the ones seized.

Diosdado did not testify but Barrow, the customs seizure clerk, testified that he had received these bags from Diosdado and had kept them in his custody thereafter until he was succeeded as seizure clerk by Marcado. The latter testified that he had received the identical bags from Barrow and had kept them in his custody to the time of the present trial; that he had taken samples of them shortly before the trial and delivered them in person to Thomas, a Government chemist. Thomas testified that he had analyzed the samples and found them to be marihuana.

Clearly there is no merit in this contention.

Third

Customs Agents testified to making demand just prior to the trial on defendant Elchuk in the county jail and on Gondron in his hotel room for production of the order form required by sec. 4742 of Title 26 U.S.C.A., and of failure to produce the order form. Defendants objected to this and as to the sufficiency of the evidence in this connection. I think it was proper and sufficient proof of failure to pay the tax. Neither defendant testified. The evidence was circumstantial but so strong as to exclude any hypothesis other than that of guilt. There were no exceptions to the court's charge.

Elchuk is a second offender. Gondron had never been convicted before but in December, 1955, he was a passenger in a car along with Charles S. Haerr[4] when 40 pounds of

[4] Haerr v. United States, 5 Cir., 240 F. 2d 533.

refined marihuana was thrown out of the automobile after it had fled from an immigration checking stand on the highway about 14 miles from the Mexican border and from the scene of the present seizure. At that time Haerr assumed the blame, stating that Gondron and another passenger were hitchhikers. This unusual habit of being closely connected with wholesale quantities of refined marihuana explains why Gondron was sentenced to serve five years this time notwithstanding he was sentenced to only four years by Judge Ingraham who presided at the first trial. Judge Ingraham was not perhaps advised as to Gondron's having hitchhiked the ride with Haerr.

The motions for bail are overruled.

APPENDIX "E"

DANIEL ELCHUK, Petitioner,
versus
JAMES W. McCARTY, United States Marshall,

Southern District of Texas

UNITED STATES OF AMERICA
versus
DANIEL ELCHUK, Defendant

Crim. No. 17271

UNITED STATES DISTRICT COURT

S. D. TEXAS

LAREDO DIVISION

Oct. 9, 1957

(Reported 159 F. Supp. 689)

ALLRED, District Judge.

On September 20, 1956, Elchuk, along with Ray Edward Gondron, was convicted in this court, Cr. 17,271, of violations of 26 U.S.C.A. Sec. 4744(a), and 18 U.S.C.A. Sec. 545, importation, concealment, transportation and transfer of marihuana. He was sentenced to 10 years imprisonment. Both Elchuk and Gondron appealed, filed briefs in the court of appeals and sought reversal. What happened thereafter is succinctly and best stated by the per curiam opinion of the Court of Appeals:[1]

[1] Gondron v. United States, 5 Cir., 242 F. 2d 149, 150.

"* * * We need not pass on their (appellants') contentions for the Government, by its motion here, agrees that a new trial should be granted and that the judgments ought not to stand because the convictions may have been tainted by the untrue and false testimony of a specified key witness.

"The result is that the relief sought by the appellants, the reversal of the judgments, is granted as prayed for by each of them. *Mesarosh v. United States*, 352 U.S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1, and see Communist Party of *United States v. Subversive Activities Control Board*, 251 U.S. 115, 76 S. Ct. 663, 100 L. Ed. 1003.

"But since the cases are such that, exercising the discretionary duty imposed on us, 28 U.S.C.A. Sec. 2106, we would not have here rendered judgments of acquittal even though the evidence might have been insufficient, the reversals requested and obtained by appellants must be for a new trial. *Bryan v. United States*, 5 Cir., 175 F. 2d 223, affirmed 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335.

"Reversed and remanded for new trial."

Elchuk is now in the custody of the marshal awaiting the new trial directed by the mandate of the Court of Appeals. He seeks release by habeas corpus[2] upon a plea of jeopardy claiming that the reversal was not brought about by him but was granted on motion of the United States Attorney, and that most of the per curiam opinion was dicta. Quoting from general statements made in 22 C.J.S. Criminal Law Sec. 271, p. 406,[3] and the cases cited

---

[2] He does not ask to be released on bail pending trial.

[3] "It is an established principle of law that an accused in a criminal case who procures a verdict and judgment against him to be

in some of the footnotes under that section, counsel boldly states in a footnote to his brief: "So thorough has been the brief-maker's research that he is prepared to say that there are no authorities contrary to those cited." The very text quoted from C.J.S. in the brief, when applied to the facts herein, is contrary to the contention made. Elchuk's conviction was reversed on his appeal, and he acquiesced in it. He got the relief he asked—reversal of the judgment. He did not even move for rehearing in the Court of Appeals and ask for acquittal there because of insufficient evidence as was done, without success, in *Bryan v. United States*, cited in the per curiam opinion.

Since the Court of Appeals properly treated the motion of the Government as an agreement that a new trial should be granted, it was tantamount to a reversal on confession of error. In *Stroud v. United States*, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103, Stroud had been convicted of murder in the first degree and sentenced to be hanged in 1916. Upon confession of error by the United States Attorney the Circuit Court of Appeals reversed this judgment, 8 Cir., 245 F. 990. He was convicted again 1917, "without capital punishment," and upon confession

---

set aside, or arrested by the court may be tried anew upon the same or another indictment for the same offense of which he was convicted, even after he has served a part of the sentence imposed on him in the first conviction. However, it is only where accused has brought about the destruction of the first verdict that he can be tried again for the same offense; and he will be protected from a subsequent prosecution for the same offense where a valid verdict, rendered by a jury regularly obtained and impaneled, upon a sufficient indictment, is set aside by the court on its own motion or on application of the prosecuting attorney, unless accused acquiesces therein."

of error by the Solicitor General, the Supreme Court reversed a second time, 245 U.S. 680, 38 S. Ct. 222, 62 L. Ed. 544. Upon a third trial, he again was sentenced to be hanged. The Court, in denying the plea of former jeopardy, pointed out, 251 U.S. at page 18, 40 S. Ct. 50, at page 51, that Stroud "himself invoked the action of the court which resulted in a further trial." Here Elchuk invoked the reversal by appealing, by praying for reversal, by receiving the benefit of the confession of the Government that the verdict may have been tainted by perjury. As in *Mesarosh v. United States*, cited by the Court of Appeals, Elchuk himself would not have been heard to raise this question on appeal unless it was conceded by the Government. The Court of Appeals was very careful in the language used in reversing this case and forceclosed the claim now made by Elchuk.

Since in my opinion a plea of former jeopardy in bar of further prosecution, rather than a habeas corpus proceeding, would have been the proper course, I shall treat the application as such and direct that it be considered a part of the files in the criminal case. The application for the writ of habeas corpus therefore is denied; and the plea of former jeopardy is overruled. The case will stand for trial.

APPENDIX "F"

JUDGMENT

Extract from the Minutes of April 2, 1958

DANIEL ELCHUK

No. 16990

JAMES W. McCARTHY, United States Marshal for the Southern District of Texas..

On this day this cause was called and came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that this cause be remanded to the District Court with directions: to vacate its order denying petitioner's application for writ of habeas corpus; and to dismiss the application without prejudice to the determination of the issues on the merits when they are reached and presented in the orderly administration of justice.

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAY EDWARD GONDRON and DANIEL ELCHUK
versus
UNITED STATES OF AMERICA

No. 17,134

Motion To Remand For New Trial

To The Honorable Judges of Said Court:

NOW COMES Malcolm R. Wilkey, United States Attorney for the Southern District of Texas and respectfully moves the Court that the above entitled and numbered cause be remanded for a new trial at the Term of Court in Laredo, Texas, beginning February 4, 1957, and in support of this motion respectfully shows:

I.

One of the Customs Agents, Cesario Diosdado, who testified at the trial in this cause, testified to facts which differed in several respects from the testimony given by other Customs Agents. Some of his testimony appears questionable aside from the fact that it could neither be affirmed nor denied by other witnesses.

II.

While there may be some question of whether or not this witness is guilty of perjury, the testimony is tainted. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony.

This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." *Mesarosh v. United States*, 352 U.S. 1, 9 (1956).

III.

While the testimony of the other witnesses and the other evidence standing alone is sufficient to support the conviction, the evidence as a whole was inseparable in the jury room, and we cannot speculate as to what impressed the jury most strongly. The Government believes, and so asserts to this Honorable Court, that the guilt of defendants is clear, and that conviction will be obtained at a new trial without the testimony of Agent Diosdado.

WHEREFORE, premises considered, the United States respectfully moves that this cause be remanded to the District Court, Southern District of Texas, for a new trial at the term of Court beginning in Laredo, Texas, on February 4, 1957.

/s MALCOLM R. WILKEY
Malcolm R. Wilkey
United States Attorney
Attorney for Appellee

Certificate

A copy of the above Motion was served upon M. Gabriel Nahas, Jr., Scanlan Building, Houston, Texas, Attorney for Appellant, by depositing a copy in the U. S. mails, properly addressed, on the 14th day of January 1957.

/s MALCOLM R. WILKEY
Malcolm R. Wilkey

Certificate of Service

I, the undersigned counsel for petitioners on the above and foregoing petition, do hereby certify that on the _____ day of August, 1958, I mailed at Houston, Texas, one copy of the said petition to the Solicitor General, Department of Justice, Washington 25, D.C., air mail postage prepaid, and another copy to William B. Butler, Esq., United States Attorney for the Southern District of Texas, Post Office Building, Houston, Texas, first class postage prepaid, and still another copy to Charles L. Short, Assistant United States Attorney for the Southern District of Texas, Post Office Building, Laredo, Texas, air mail postage prepaid.

/s/ M. GABRIEL NAHAS, JR.
M. Gabriel Nahas, Jr.
Attorney for Petitioners

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Office Supreme Court, U.S.
FILED
SEP 16 1958
JAMES R. BROWNING, Clerk

No. 311

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAY EDWARD GONDRON AND DANIEL ELCHUK,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 311

RAY EDWARD GONDRON AND DANIEL ELCHUK,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 21-26) is reported at 256 F. 2d 205. The opinion on the prior appeal (Pet. 28-29) is reported at 242 F. 2d 149. Opinions of the district court (Pet. 30-37) are reported at 159 F.Supp. 689 and 691.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1958. Rehearing was denied on July 30, 1958. The petition for a writ of certiorari was filed

on August 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a plea of former jeopardy is properly overruled where the first conviction was appealed by petitioners and reversed and remanded for new trial on the government's confession of error.

STATEMENT

In September, 1956, in the United States District Court for the Southern District of Texas, petitioners were convicted on an indictment alleging a violation of 26 U.S.C. 4744(a) by failing to pay transfer tax after acquiring marihuana. On appeal, the Government filed a Motion to Remand for New Trial admitting that the testimony of one of its witnesses was questionable and possibly untruthful, and stating that, under the circumstances, the dignity of the United States would not permit the conviction to stand (Pet. 39-40). The Court of Appeals reversed and remanded for a new trial, saying, "The result is that the relief sought by the appellants, the reversal of the judgments, is granted as prayed for by each of them". (Pet. 28-29; 242 F. 2d 149).

In the trial court, the petitioners raised a plea of former jeopardy against a second trial, alleging that they had not acquiesced in the motion of the Government (R. 7-8). This plea was overruled (R. 10, 192-193; Pet. 34-37). A second conviction was obtained and appealed (R. 175-176, 183-186). The Court of Appeals affirmed this second conviction (R. 200-207; Pet. 21-26).

ARGUMENT

Petitioners' argument that in some manner they did not "acquiesce" in the disposition of their first appeal is best answered by the opinion of Judge Allred denying petitioners' plea of former jeopardy (Pet. 36):

> * * * Elchuk's conviction was reversed on his appeal, and he acquiesced in it. He got the relief he asked—reversal of the judgment. He did not even move for rehearing in the Court of Appeals and ask for acquittal there because of insufficient evidence as was done, without success, in *Bryan* v. *United States*,* cited in the *per curiam* opinion.

Petitioners recognize that if the reversal of their first conviction had resulted solely from their appeal, they would have no standing to claim double jeopardy. They argue, nevertheless, that because the government agreed to a reversal of the conviction, they were put in jeopardy by the second trial. There is no merit in this contention.

As the district court pointed out, the relief which petitioners sought on the first appeal was the relief which they obtained—reversal of the judgment of conviction. The fact that the government made it easier for them to achieve that result does not alter the fact that they were the ones who, by appealing, sought reversal. As the district judge further pointed out, petitioners so far acquiesced in the result that they did not even ask the Court of Appeals, on the first appeal, to enter a judgment of acquittal, rather than remand for a new trial. Their attempts to draw metaphysical distinctions between judgments "set

---

* *Bryan* v. *United States*, 338 U.S. 552 (footnote added).

aside" and "reversed" does not aid them. Since they sought a readjudication of a conviction, they waived any right to plead former jeopardy.

In *Bryan* v. *United States*, 338 U.S. 552, petitioner complained that the Court of Appeals had no right to remand his case for a new trial when they might have granted his contention that he was entitled to a judgment of acquittal. He argued that his right to invoke the plea of former jeopardy arose when his right to a judgment of acquittal accrued in the appellate court. The former jeopardy aspect of the case was extensively treated in the briefs for both parties, yet the Court disposed of the matter as follows (338 U.S. 552, 560):

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. ". . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial".

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER, 1958.

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JAMES R. ... C. Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 311

RAY EDWARD GONDRON and DANIEL ELCHUK,
Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING AND MOTION TO REMAND

M. GABRIEL NAHAS, JR.,
Attorney for Petitioners,
602 Scanlan Building,
Houston 2, Texas.

Of Counsel:
FRANK J. DONNER,
342 Madison Avenue,
New York 17, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 311

RAY EDWARD GONDRON and DANIEL ELCHUK,
Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING AND MOTION TO REMAND

Petitioners pray for a rehearing of the order of the Court entered on October 20, 1958, denying their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The opinion of the court below affirming the convictions (App. 21-26) has now been reported at 256 F. 2d 205. The prior opinion of the court below reversing the convictions and remanding for a new trial (App. 28-29) appears at 242 F. 2d 147.

I.

Preliminary Statement of Reasons for Rehearing.

Petitioners are aware of the limited grounds available to them on this rehearing. However, the interests of justice require this second presentation to the Court because the

underlying issues in the case which warrant the intervention of this Court were not previously presented. These issues raise important constitutional questions which profoundly affect the administration of the criminal law in the federal courts.

In our first petition we unsuccessfully sought review of the case on the sole ground (Pet. 8) that, "Where a valid verdict rendered by a jury regularly obtained and empaneled upon a valid and sufficient indictment, is set aside upon the application of the prosecuting attorney an accused will be protected from a second prosecution for the same offense, unless he acquiesces in such application." We do not reiterate that ground here. Indeed, in this petition we assume (but do not concede) that if an appellant asks for a new trial, his immunity from the jeopardy of a new trial does not turn upon the identity of the party which obtains the result of a new trial. We insist, however, that the double jeopardy protection does attach where, as here, the government has improperly prevented the appellate court from ordering a judgment of acquittal for lack of evidence.

II.

Questions Presented.

1. After the appeal had been filed and before argument, the government successfully moved in the court below that the case be remanded, without consideration of petitioners' appeal, including their attack upon the sufficiency of the evidence. This motion (App. 39-40) sought a new trial solely because the government's chief witness (Record on First Appeal, 14), a customs agent "testified to facts which differed in several respects from the testimony given by other Customs Agents. Some of it appears questionable aside from the fact that it neither be affirmed nor denied by other witnesses" (App. 39). This motion was unpar-

ticularized, unsworn, unsupported by affidavit, not acquiesced in by the defendants, not based upon newly-discovered evidence, or a claim of recantation. Nor did the motion state why relief was not sought until after the filing of the appeal, in what respects the testimony was material, or that the government believed it to be truthful at the time it was given. A question is presented whether the decision of the court below remanding the case on the bare allegations of the government's motion is authorized by *Mesarosh v. United States*, 321 U. S. 1 or *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115.

2. If the court below improperly remanded the case on the motion of the government, thus frustrating petitioners' attack upon the sufficiency of the evidence, did a second prosecution:

(a) Invade either the double-jeopardy or the due process protections of the Fifth Amendment, or

(b) Constitute a departure from proper standards of the administration of the criminal law in the federal courts.

3. A question is presented whether the case should not now be remanded to determine if the testimony of the customs agent was, in fact, truthful but was attacked in bad faith and in deception of the court below, or if, although tainted, it was acquiesced in and knowingly used by the government to obtain the convictions and then repudiated in order to thwart petitioners' appeal.

4. The court below expressly refused to pass on petitioners' contentions, including those seeking an order of acquittal, because of the motion filed by the government. Despite this fact, the court, in order to foreclose a claim of former jeopardy, equated the relief which petitioners could have obtained with that sought by the government. Does *Bryan v. United States*, 338 U. S. 552, upon which the court

below relied, authorize an appellate court, without reviewing the record or considering appellants' contentions seeking acquittal, to remand a case for a new trial on the hypothesis that it would have ordered a remand if it had considered the attack on the sufficiency of the evidence?

5. If an appellate court has the power thus preclusively to dispose of a contention without considering it, was the power properly exercised in this case where the government had impeached the integrity of the entire record.

III.

Reasons Which Could Have Been But Were Not Previously Advanced for Granting the Writ.

1. If petitioners had been acquitted on their first appeal, that acquittal would bar a second trial under the double jeopardy protection of the Fifth Amendment. *Sapir v. United States*, 348 U. S. 373. In this case, petitioners were not acquitted. We think it clear, however, that their right to an acquittal, and hence to a termination of their jeopardy, was unjustifiably destroyed by the government.

2. In challenging the truthfulness of its own witness, the government relied upon *Mesarosh v. United States*, *supra*. But, in *Mesarosh*, it should be emphasized at the outset, the appellants' contentions that the evidence was insufficient to sustain their convictions were fully reviewed by the Court of Appeals for the Third Circuit, 223 F. 2d 449. It was only after a petition for certiorari had been filed in this Court that the government sought a remand. Moreover, the government's motion to remand specified that it was based upon newly discovered evidence about Mazzei's testimony in proceedings subsequent to the trial and that the government believed the testimony was truthful at the time it was given. Motion to Remand, *Mesarosh v. United States*, pp. 2, 6, ftn. 1. Further the government

took pains to explain that it had not slept on its doubts about Mazzei's testimony but had immediately sought to share them with the Court. Motion to Remand, *Mesarosh v. United States*, p. 6, ftn. 1. Finally, the materiality of the testimony and its impact upon the case were fully aired. Motion to Remand, p. 2, *Mesarosh v. United States*, 325 U. S. at 12, ftn. 6. Similarly, in *United States v. Shotwell Mfg. Co.*, 355 U. S. 233, the government's allegations concerning the testimony of the witnesses sought to be impeached were highly particularized and supported by affidavits and amounted to a charge of fraud on the court. And the Court was explicit in assuring the respondents that they would be denied review of their claim of insufficiency of the evidence only if the government's contentions with respect to the suppression motion were established.

3. Here, a sharply contrasted situation is presented. The government's motion (App. 30-41) sought to foreclose a review of appellants' contentions that their convictions were based upon insufficient evidence. And this effort to abort their appeal was based upon grounds so flimsy as to be almost grotesque. The entire motion boils down to a contention that the testimony of one agent differed from the testimony of other agents and that some of it was neither affirmed nor denied by other witnesses. It also mysteriously and without particularization referred to the fact that "some of his testimony appears questionable." Although the government claimed in the court below that the performance of this witness polluted the administration of justice, and compromised the dignity of the United States, he is still employed as a customs agent. Indeed, counsel has been informed that this agent did not know of the existence of the motion until November 6, 1958 when it was read to him over the telephone. See attached affidavit. Is this an example of "commendable candor" (*Mesarosh v. United States, supra*, at 8) or of tampering with the judicial process?

Nor can cryptic references to the "tainted" character of the testimony or the invocation of the "dignity of the United States" redeem the motion and endow it with substance. On the face of it—and without regard to questions of bad faith—the motion seeks a new trial through the device, not open to either side in a criminal case, of impeaching after judgment, the credibility of a witness upon the basis of his testimony at the trial. Such a ground for a new trial is not merely unjustified; it is unheard of. As the Court pointed out in *Mesarosh*, *supra*, at 9, even newly-discovered evidence affecting the credibility of a witness is no ground for a new trial when sought by a defendant.

4. *Mesarosh* shields the administration of justice in a criminal trial from infection. Here *Mesarosh* has been transformed into a sword to curtail the rights of these petitioners. Certainly it was never intended by the Court that the *Mesarosh* case would be construed, as it has been in effect here, to amend the Rules of Criminal Procedure so as to make unilaterally available to the government a means of foreclosing appeal and of forcing a defendant to run the gauntlet again when it seems convenient or opportune to do so.

This Court insisted in the *Shotwell* case, *supra*, that a "convincing showing is of course necessary to bring these principles [of the *Mesarosh* case] into play." 355 U. S. at 242. Such showing was obviously not made here. It seems to us that review is imperative to clarify and limit the circumstances under which the principles of the *Mesarosh* case are operative. We earnestly submit that the power to obtain a new trial on *Mesarosh* grounds should not be left at large.

5. The dangers which are threatened by the interpretation of *Mesarosh* adopted by the court below are demonstrated by the record in this case. Although the indictment invokes not one but two separate and quite different statutes (R. 5-6), the first trial judge wholly failed to charge essential elements of the offenses as defined in these statutes

(Record on First Appeal, 205-211 and compare R. 132-134). This failure was fatal error. Moreover, petitioners presented a strong challenge to the sufficiency of the evidence (Brief on Appeal, No. 16,334, pp. 12-15). By shutting off their appeal and obtaining a new trial the government thus had nothing to lose and everything to gain. The granting of the government motion would produce a result which was in any event inevitable, would cut off appellate review of the claim of insufficiency and enable the government to bolster its case in a second trial.

The Court in *Mesarosh* has defined with some particularity the problems and dangers which a motion of the kind involved here raises. Yet the court below was apparently unwilling to order the government to ventilate the details of the alleged untruthfulness of the Agent Diosdado either by a "truth hearing" on remand (compare the government's Motion to Remand, p. 6, in the *Mesarosh* case) or through its own inquiry. But it was hardly proper to respect a governmental interest in privacy when to do so might not only disfigure the sound administration of justice but also jeopardize basic rights of the defendants to an acquittal either because the convictions were the product of knowing use of tainted testimony at the trial or because of an appellate showing of lack of evidence to support an acquittal.

6. The reliance of the motion upon the record (rather than upon post-trial occurrences) inherently stirs doubts about the prosecution's conduct and motives. We are unable to find anything in the record of the first trial that could conceivably have persuaded the lower court that Diosdado "testified to facts" (App. 39) which resulted in a taint of the record.

If the testimony was not tainted, a serious question arises whether the motion was filed in bad faith and in deception of the court below for the purposes already referred to above. On the other hand, if Diosdado lied or concealed vital facts, petitioners could well have been con-

victed by testimony the tainted character of which was known to the government at the trial. Compare, *Alcorta v. Texas*, 355 U. S. 28. And the record makes this more than a speculation for Agent Diosdado, whose allegedly tainted testimony was the basis of the motion to remand, was the government witness who prepared the case, sat at counsel table at the trial and who, by virtue of his position as "client" was excepted, on motion of the government, from the rule excluding witnesses from the courtroom.*

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* The following colloquy in the Record on the First Appeal is of significance (pp. 14-15):

"Mr. Nahas: At this time if the Court please, the defendant moves that the rule be invoked as to all witnesses, with no exceptions.

"Mr. Short: Your Honor, at this time the Government would request that Mr. Diosdado and the chemist be allowed to remain in the courtroom. We will not insist on the chemist over the objection of the defendants.

"The Court: Agent Diosdado is the agent who worked up the investigation of the case?

"Mr. Short: That's correct, your Honor.

"The Court: It is the understanding of the Court that under such circumstances the agent sits in the position of the client; the lawyer is entitled to have his client by his side, as the lawyer is not directly interested in the case. He is representing the case of the client before the Court. Does the defendant urge any reason why we should make any exception in this case?

"Mr. Nahas: The defendant does urge, if the Court please. His reasoning is as follows: that Mr. Diosdado, as the Court has so ably stated, has worked this case and therefore he becomes a very necessary party and would be in a position to know and hear that which is said and spoken by each and every witness throughout the case. And, accordingly, the defendant feels that Mr. Diosdado would be in a position to guide the Government's case, and at this time again the defendants insist on their original motion that the rule be invoked with no exceptions as to any of the witnesses.

"The Court: The rule for the exclusion of witnesses is invoked, except that Agent Diosdado may remain in the courtroom at all times, and the witness Howard Bennett, who is strictly a technical witness, will be allowed to remain in the courtroom at all times."

The government's motion thus cried out for further inquiry. The granting of the motion by the court below was wrong. Its failure to probe the bases for the motion challenges the responsibility of this Court for the supervision of the administration of the criminal law in the federal courts. At a very minimum this responsibility requires that the Court should now remand the case for such inquiry.

7. The Court's intervention is particularly warranted because the expansion of the government's power to obtain a new trial in a criminal case creates new pressures upon the historic and important protection of double jeopardy. By preventing, on essentially trivial grounds, an appellant from terminating his jeopardy, the government can harass him on the installment plan indefinitely by discovering new blemishes in the record which prevent a disposition of the appeal. This Court must make it clear that the great protection against double jeopardy is not to be made a plaything of legal maneuver.

8. It is too late to argue that an appellant does not normally sacrifice his claim of double jeopardy by seeking a new trial. But the waiver—if such it may be called—is not absolute, and must, as in the case of all restraints upon constitutional protections, be narrowly construed. *Johnson v. Zerbst*, 304 U. S. 458. The mere invocation of the appellate process is no waiver (*Green v. United States*, 355 U. S. 184); nor can it be said that an appellant agrees to a second prosecution which results from the government's wrongful frustration of his efforts to terminate the jeopardy of the first. So to hold would make waiver an irrational pretext for wiping out the protection of double jeopardy. When a defendant makes impossible a valid judgment, his judgment of acquittal is not former jeopardy. (See American Law Institute, *Double Jeopardy*, Section 11.) So, too, the government's wrongful prolongation of jeopardy must bar a second trial. This result is required not only by

fundamental fairness but by the root policy of the double jeopardy protection against endless harassment of a defendant.

9. We believe that the lower court agrees with our contention that a remand on the government's motion without consideration of the appeal raised a double jeopardy problem. It thus sought to apply therapy to this problem by combining its remand for a new trial with a hypothetical disposition of the appeal. More specifically, the court below, while expressly refusing to pass on petitioners' contentions that the judgments were invalid for insufficiency (App. 28), nevertheless ruled that even if the evidence were insufficient it would have confined the reversal to one ordering a new trial. It relied upon *Bryan* v. *United States*, *supra*, as authority for its ruling.

It must be emphasized that the lower court's construction and application of the *Bryan* case to this case is the foundation of the denial of petitioners' double jeopardy plea. It was the lower court's reading of the *Bryan* case which enabled it to equate the relief granted in the first instance on the government's motion with that "requested and obtained by appellants" (App. 29). Since appellants had thus hypothetically "obtained" the relief to which they were entitled, they waived the jeopardy of a second trial and could not claim that the court's response to the government's motion had improperly prolonged or enlarged their jeopardy by frustrating their appeal. Similarly, when the double jeopardy contention was subsequently made, Judge Allred relied upon the language of the Court of Appeals to reach the conclusion that petitioner Elchuk, "got the relief he asked—reversal of the judgment—* * * the Court of Appeals was very careful in the language used in reversing this case and foreclosed the claim now made by Elchuk" (159 F. Supp. 689; App. 36-37). And when the case came to it a second time, the Court of Appeals restated the rationale implied in its prior decision that a plea of

double jeopardy is not available to "one who has sought and obtained reversal and new trial to obtain and keep the benefit without the burden of the new trial" (App. 24). Thus, if *Bryan* does not give a court the power to rule speculatively and hypothetically on an appeal attacking the sufficiency of the evidence, the court did not "foreclose the claim" of double jeopardy.

10. The lower court, it will be recalled, expressly refused to review appellants' contentions challenging the sufficiency of the evidence (App. 28). Its stricture that it would not have ordered an acquittal had it reviewed appellants' contentions is thus purely speculative in nature. The *Bryan* case construes 28 U. S. C., Section 2106 to empower an appellate court to enter judgment for a new trial even where it is of the view that the evidence is insufficient to support the conviction. But this is a far cry from holding that a court has the power to dispose of a claim of insufficiency by remand for a new trial without considering it at all. In the *Bryan* case, the lower court carefully considered appellants' challenge to the sufficiency of the evidence and only after such careful consideration ordered a new trial rather than an entry of a judgment of acquittal. 175 F. 2d 223. Surely, the *Bryan* case does not arm an appellate court with authority to dispose of a challenge to the sufficiency of the evidence by remand rather than entry of a judgment of acquittal when, as here, it has refrained from reviewing the sufficiency contentions.

11. And the Court of Appeals could not possibly have reviewed appellants' contentions by examining the record because the record was challenged by the government itself. How could the Court of Appeals determine that appellants' contentions would merit only a reversal, when it knew that the government had repudiated its chief witness and was contending that "the evidence as a whole was inseparable in the jury room and we cannot speculate as to what impressed the jury most strongly?" (App. 40). Thus, even

if the *Bryan* case gives a Court of Appeals the discretion to render a contingent judgment of reversal on appellants' challenge to the sufficiency of the evidence, it could hardly exercise such discretion in this case.

12. Finally, in contrast to the *Bryan* case, the wrongful action of the government frustrated petitioners' appeal. This decisive difference, it seems to us, makes inapplicable here the ruling in the *Bryan* case, relied on by the government in its Brief in Opposition, p. 4, that the petitioner there would not suffer double jeopardy by a second trial. Nor can the availability to petitioners of a plea of double jeopardy be made to turn upon the failure to move for rehearing in the Court of Appeals. The failure to seek a rehearing was hardly acquiescence in the result. The hard fact is that petitioners refused to join in the government's motion and pressed their appeal both in their briefs and in oral argument. They were required to do no more.

Conclusion

This case raises important and troublesome questions concerning the scope and applicability of both the *Mesarosh* and *Bryan* cases. These reasons and the reasons stated above require that the petition for writ of certiorari be granted, the decision below reversed, and the indictment dismissed.

In the alternative, the petition for writ of certiorari should be granted for the reasons above stated and the case remanded to the District Court for inquiry into the government's motion to remand.

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Of Counsel:
Frank J. Donner,
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Certificate of Counsel

I certify that the within and foregoing Petition for Rehearing and Motion to Remand is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioners although not previously presented.

FRANK J. DONNER,
Of Counsel for Petitioners.

Affidavit of M. Gabriel Nahas, Jr.

STATE OF TEXAS }
COUNTY OF HARRIS } ss.:

Before me, the undersigned notary public, this day personally appeared M. GABRIEL NAHAS, JR., personally known to me, and who being by me first duly sworn, did state on his oath the following:

My name is M. Gabriel Nahas, Jr. I am a member of the Texas Bar and of the Bar of the Supreme Court of the United States. I am and have been for many years practicing law in the city of Houston, Texas.

I was counsel for the defendants in that certain cause lately pending in the United States District Court for the Southern District of Texas, Laredo Division, wherein the United States of America was plaintiff and Ray Edward Gondron and Daniel Elchuk were defendants, numbered 17,271 on the criminal docket of that court. I represented the defendants in their first trial, which began on the 19th day of September, 1956, in said cause, in the said district court. I was counsel for them on their appeal from their conviction following the said first trial. I was also counsel for said defendants and represented them in their second trial and in their second appeal from their second conviction, on their petition for the writ of certiorari to the Supreme Court of the United States, numbered 331 on the docket of that court, and in their petition for a rehearing of the order denying their said petition for the writ of certiorari.

I further state under oath that I know one Cesario Diosdado, who, at the time of the first trial of petitioners was a customs agent stationed at Laredo, Texas, and who testified on behalf of the government in said trial. I further know that Mr. Diosdado is still employed by the cus-

toms bureau of the United States Government and is stationed at the port of Key West, Florida.

My authority for this sworn statement is a telephone conversation I had this day with the said Cesario Diosdado himself, at his residence telephone number in Key West, Florida, (CYpress 4-1693) from my office number in Houston (CApitol 2-0670).

I further state under oath that in my said telephone conversation with Mr. Diosdado I informed him of the motion filed by the government pending the petitioner's first appeal (Appendix G to petitioner's petition for the writ of certiorari, page 39, et seq.), and read him the motion verbatim. It is my understanding from the statement made by Mr. Diosdado in my telephone conversation with him this was the first knowledge he had that the government had filed such motion and he expressed great surprise that it had been done.

M. GABRIEL NAHAS, JR.

SUBSCRIBED AND SWORN TO BEFORE ME by the said M. Gabriel Nahas, Jr., this 8th day of November, 1958.

JOE OVERSTREET
Notary Public in and for
Harris County, Texas

[SEAL]